IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0304

LAVERENE BELK,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
OF BENTON COUNTY (PCCV008569)
THE HONORABLE LARS G. ANDERSON, JUDGE

APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

This case presents a substantial issue of first impression and should be retained by the Supreme Court. Iowa R. Of App. P. 6.1101(2)(c). Specifically, this case concerns the applicability of Chapter 822(1)(a) to the Sex Offender Treatment Policy of the Iowa Department of Corrections.

STATEMENT OF THE CASE

Nature of the Case

Applicant filed a notice of appeal from the District Court's dismissal of the post-conviction relief action.

Course of Proceedings

The State agrees with Course of Proceedings as set for in Applicant Belk's brief as essentially correct.

Facts

Applicant Belk adopted the District Court's thorough factual summary, and the State accepts this recitation of the facts as essentially correct. Additional relevant facts will be set forth below.

ARGUMENT

I. The Court Should Affirm the District Court's Grant of the Motion to Dismiss Because Iowa Code §822.2(1)(a) is Inapplicable to Belk's Claim

Preservation of Error

The standard has been stated:

> We now apply the preservation of error rule to this case. The rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue. . . . The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it.

Meier v. Senecaut, 641 N.W.2d 532, 540 (Iowa 2002) (citations and footnote omitted).

Here, Applicant properly preserved the issue. Order, filed January 29, 2016; App. 39

Standard of Review

Generally, postconviction relief proceedings are reviewed for correction of errors at law." *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010); *Waters v. Iowa Dist. Court for Henry County*, 783 N.W.2d 487, 488 (Iowa 2010) (citation omitted). Claims involving constitutional rights are reviewed in the totality of the circumstances and the record upon which the postconviction relief court's ruling was made; the functional equivalent of *de novo* review. *Dykstra v. Iowa Dist. Court for Jones Cnty.*, 783 N.W.2d 473, 477 (Iowa 2010).

Merits

Petitioner Laverene Belk filed this post-conviction action pursuant to Iowa Code §822.2(1)(a), challenging the length of time he has served in prison. Belk has been incarcerated within the Iowa Department of Corrections [IDOC] since 1992. Belk was convicted of Kidnapping in the Second Degree, Sexual Abuse in the second Degree, Extortion, and Going Armed With Intent. Belk received twenty-five year sentences on the Kidnapping and Sex Abuse counts

and two five-year sentences on the remaining two counts. The sentences were run consecutively for a total of sixty years. Importantly, Belk does not challenge the sentence itself, but rather a designation in his IDOC file recommending he complete the sex offender treatment program [SOTP]. Belk complains that the SOTP recommendation has caused the parole board [IBOP] to deny his early release. Belk contends that IDOC policy, under which inmates are not offered SOTP until near the end of their sentence, has denied him a meaningful opportunity for parole. Belk's claims cannot be redressed by Iowa Code §822.2(1)(a), and the Court should affirm the District Court's dismissal of this case.

A. Chapter 822 Does Not Include Statutory Authority for Postconviction Review of Parole Board Policies

The Court should affirm the District Court finding that Belk's claims should be dismissed. Belk filed this postconviction relief action pursuant to Iowa Code §822.2(1)(a), which allows for post-conviction relief actions when a "*conviction or sentence* is in violation of the Constitution of the United States or the Constitution or laws of this

state" (emphasis added). This case has nothing to do with Belk's underlying conviction or Belk's sentence as imposed in 1992. Consequently, Chapter 822.2(1)(a) cannot be the vehicle to redress his claims.

The District Court noted the inapplicability of section 822.2(1)(a) to Belk's claims, and its analysis and ruling on this point should be upheld:

> Belk's Amended and Substituted Application for Post-Conviction Relief was filed pursuant to Iowa Code section 822.2(1)(a), which provides for relief when "[t]he conviction or sentence was in violation of the Constitution of the United States or the Constitution or the laws of this state." Belk admits that he is not challenging either his underlying conviction or sentence – again Belk is challenging the IDOC's SOTP related recommendation and policies and the impact those policies have had on his sentence.
>
> . . .
>
> [ ] Belk argues that the IDOC's SOTP policies constitute "an additional mandatory minimum sentence that violates the law," creatively attempting to bootstrap his claims into those authorized by section 822.2(1)(a). Other than *Maghee* [*v. State*, 773 N.W.2d 228 (2008)], Belk cites no authority in support of his argument and *Maghee* and related cases

> are inapplicable. Even if IDOC's SOTP policies have impacted Belk's ability to be paroled, section 822.2(1)(a) does not afford Belk a means to challenge those policies.

Ruling, p. 5. (internal citations omitted).

Belk's essential complaint is that he is still in prison beyond when expected to be paroled. Belk asserts the reason he has not been paroled is that his file notes he has not completed recommended SOTP. However, Belk cannot backdoor a challenge to IBOP's denial of Belk's parole by filing an action against IDOC. IBOP is not a party to this case. The proper challenge to an IBOP decision is through the board's administrative appeals process and subsequent action filed under Chapter 17A. *McKeag v. Iowa*, 772 N.W. 2d 269 (Table) 2009 WL 2169041, (Iowa Ct. App. 2009) (upholding District Court order dismissing post-conviction action complaining about parole board process). The *McKeag* Court held Chapter 822 was not the proper method to raise a complaint against IBOP, but rather that challenges to IBOP actions must be brought pursuant to Chapter 17A. Id. at *3. See also, *Pierce v. State, Iowa Dep't of Corr.*, 807 N.W.2d 158 (Iowa

Ct. App. 2011)(Table); *Johnson v. Iowa Dep't Of Corr.*, 2001 WL 427351, at *1 (Iowa Ct. App., Apr. 27, 2001).

Subsequent to the District Court decision in this case, the Iowa Court of Appeals issued a decision in a case with facts very similar to Belk's, in which an inmate claimed that his parole status was negatively impacted by IDOC policy regarding sex offender treatment. *Fassett v. State*, 885 N.W.2d 441 (Table) 2016 WL 3554954 (Iowa Ct. App. 2016). The *Fassett* court affirmed the dismissal of the inmate's post-conviction action, stating "Chapter 822 does not include statutory authority for postconviction review of parole board policies." *Fassett v. State*, 885 N.W.2d 441 (Table) 2016 WL 3554954 at * 4(Iowa Ct. App. 2016). The Court should affirm that the proper avenue to challenge a decision of IBOP is through Chapter 17A.

B. Belk's Sentence Has Not Changed and Remains Constitutionally Valid

Belk asserts the IDOC's recommendation that Belk complete SOTP is being adversely used against him by IBOP to withhold an early release to which he would otherwise be eligible. Leaving aside

the procedural problems with bringing a complaint about an IBOP decision into an action against IDOC, Belk's complaint's is that the SOTP classification decision has extended his time in prison. However, the SOTP recommendation has not affected the length or nature of Belk's sentence. As a result this claim does not fall under Iowa Code 822.2(1)(a), which is properly understood to allow for challenges to the conviction itself or the sentence as imposed by the District Court. See *Veal v. State*, 779 N.W.2d 63, 64 (Iowa 2010) (allowing an applicant to challenge her sentence as an illegal sentence based on cruel and unusual punishment in a postconviction relief action); *State v. Tejeda*, 677 N.W.2d 744, 752 (Iowa 2004)(affirming post-conviction challenge when conviction was constitutionally deficient). Belk entered prison on a sixty-year sentence, and has received all of the earned time to which he is entitled by law. He will discharge his sentence, on schedule, in 2017, provided he does not lose earned time due to discipline. The SOTP classification has not affected Belk's sentence at all. IBOP may or may not decide to release him prior to that date, but IDOC has no statutory or Constitutional

requirement to recommend Belk for early release. As a result, Iowa Code 822.2(1)(a) cannot afford Belk relief and the District Court properly granted the motion to dismiss.

C. Belk Has No Constitutional Interest in Early Release

Apart from the alleged impact on parole, Belk can point to no other consequence of the classification decision that would constitute a protected Constitutional interest. A person convicted of a crime that subjects the person to imprisonment "has no fundamental liberty interest in freedom from incarceration." *State v. Sallis*, 786 N.W.2d 508, 515 (Iowa Ct. App. 2009) (quoting *People v. Oglethorpe,* 87 P.3d 129, 134 (Colo.Ct.App.2004). Once a person has been convicted, his liberty has been limited through due process. The United States Supreme Court has explained:

> [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.

Meachum v. Fano, 427 U.S. 215, 224 (1976); see also *Lyon v. State*, 404 N.W.2d 580, 583 (Iowa Ct.App.1987) (noting that "[o]nce a valid conviction has been entered, the defendant has been constitutionally deprived of his liberty to be conditionally released"). Belk was convicted of a sex crime and as a result has no fundamental liberty interest in conditional or early release. Well established case law sets forth Belk has no fundamental liberty interest in early release. See *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex,* 442 U.S. 1, 5 (1979) (holding no right to parole before the expiration of a valid sentence); *State v. Cronkhite*, 613 N.W.2d 664, 667 (Iowa 2000) (stating "[t]here is no constitutional or inherent right to be conditionally released from prison prior to the expiration of a valid sentence"); *State v. Wright*, 309 N.W.2d 891, 894 (Iowa 1981) ("Neither does he have a constitutional right to parole."). In the absence of a Constitutional interest, Belk cannot assert a viable cause of action under Iowa Code §822.2(1)(a).

An inmate does not have a right to a particular program, or classification status. See *Drennan v. Ault*, 567 N.W.2d 411, 414 (Iowa

1997) (holding transfer to a higher degree of confinement or a reclassification to a more supervised form of prison environment does not trigger a statutory due process right to a hearing). Belk has no constitutional right to any particular course or class of treatment while in prison. See *Wishon v. Gammon*, 978 F.2d 446, 450 (8th Cir. 1992) (no constitutional violation for denial of educational and vocational opportunities); *Stewart v. Davies*, 954 F.2d 515, 516 (8th Cir. 1992) (no constitutional right to participate in rehabilitation program even if participating affected parole eligibility). Consequently, none of Belk's constitutional rights are implicated by the IDOC's SOTP recommendation.

D. Belk is a Convicted Sex Offender and IDOC Properly Recommended Sex Offender Treatment

Moreover, the fact that Belk was convicted of a sex offense negates any other Constitutional interest that Belk might seek to assert with respect to his classification for SOTP. IDOC has classified Belk as a sex offender, and there is no doubt Belk should be classified as a sex offender, based upon his previous conviction. Case law clearly

establishes that a conviction for a sex offense by itself sustains classification as a sex offender:

> An inmate who has been convicted of a sex crime in a prior adversarial setting, whether as the result of a bench trial, jury trial, or plea agreement, has received the minimum protections required by due process. Prison officials need do no more than notify such an inmate that he has been classified as a sex offender because of his prior conviction for a sex crime.

Dykstra, 783 N.W.2d at 484 (Iowa 2010) (quoting *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997); see also *Waters v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 487, 489 (Iowa 2010) (holding IDOC could require inmate convicted of sex offense to participate in SOTP); *Holm v. Iowa Dist. Court for Jones Cty.*, 767 N.W.2d 409, 418 (Iowa 2009), as amended (July 6, 2009) (holding inmate inmate's conviction for sex offense provided sufficient due process protections to sustain IDOC classification of inmate for SOTP); see also *State v. Iowa Dist. Court for Webster Cty.*, 801 N.W.2d 513, 528 (Iowa 2011)(holding that "that he has been convicted as a sex offender," there was no Fifth Amendment violation when inmate was required

to complete SOTP in order to be eligible for earned time). As a result, there is no further liberty interest at stake in the classification of Belk as a sex offender. The recommendation that Belk complete SOTP is part of that classification.

Inmates convicted of sex offenses can be required to complete SOTP, and those who fail to do so can lose earned time. See Iowa Code §903A.2(1)(a); *Reilly v. Iowa Dist. Court for Henry Cty.*, 783 N.W.2d 490, 498 (Iowa 2010); *Dykstra v. Iowa Dist. Court for Jones Cty.*, 783 N.W.2d 473, 484 (Iowa 2010). However, because Belk's conviction predates the 2005 legislative change to section 903A.2, his earned time cannot be impacted due to his failure to complete SOTP. *State v. Iowa Dist. Court for Henry Cty.*, 759 N.W.2d 793, 801 (Iowa 2009). But the fact remains his conviction alone sustains the recommendation that Belk complete SOTP. Case law clearly shows that an inmate convicted of a sex offense is a candidate for SOTP, based solely on the underlying conviction. See *Holm v. Iowa Dist. Court for Jones Cty.*, 767 N.W.2d 409, 418 (Iowa 2009) (upholding IDOC requirement for inmate convicted of sex offense to participate

in SOTP); *Dykstra*, 783 N.W. 2d at 484. (stating "sex-offense convictions provide due process" sufficient to support SOTP requirement). Consequently, Belk has failed to show that his "*conviction or sentence* is in violation of the Constitution of the United States or the Constitution or laws of this state." See Iowa Code §822.2(1)(a). Put another way, he has not shown the lack of sex offender treatment has rendered his conviction or sentence unconstitutional. If Belk was under the impression he would only serve 12 years for a violent rape and kidnapping, that is not the result of some constitutional deficiency by IDOC. The length of Belk's incarceration may be longer than he wanted, but it is not illegal or unconstitutional, nor somehow longer than the sentence for which he was originally incarcerated. Thus, Belk had no liberty interest that was injured by the decision to recommend that he complete SOTP or the IDOC's sequencing of that treatment program. The Department's requirement that Belk complete SOTP did not further stigmatize him. In the face of the current sex offense conviction, Belk's classification for SOTP created no injury to any liberty interest. He came in to

prison to serve a sixty year sentence for kidnapping and sexual assault. He will discharge his sentence as dictated by the term of his incarceration, minus the applicable earned time reduction. There is no Constitutional infirmity that can be redressed by Chapter 822.2(1)(a). As a result, the Court should affirm the dismissal of Belk's post-conviction action.

CONCLUSION

For the forgoing reasons, the Court should affirm the dismissal of Belk's post-conviction action.

REQUEST FOR ORAL ARGUMENT

Respondent does not request oral argument, but seeks the opportunity to be heard if argument is granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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Dated: December 16, 2016

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